STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF STATE OF MICHIGAN,
Plaintiff-Appellee,

v

Supreme Court
No. 122021

BENJAMIN PHILLIPS,
Defendant-Appellant.

Third Circuit Court No. 99-009754
Court of Appeals No. 230897

BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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The People say: "No."
Defendant says: "Yes."
The Court of Appeals affirmed defendant's conviction.

II. **To show ineffective assistance of counsel, defendant must prove that counsel committed a serious error which prejudiced defendant's right to a fair trial. Here, the CSC 1, personal injury claim specified physical injury, all discovery materials indicated physical injury to the victim, and at trial, counsel questioned the victim and witnesses as to the physical injuries even though the defense was denial of any assault, and there was no objection to the court considering the great bodily harm charge. Has defendant shown that counsel committed a serious mistake which prejudiced his right to a fair trial?**

The People say: "No."
Defendant says: "Yes."
The Court of Appeals affirmed defendant's conviction.

Statement of Facts

The People accept the statement of facts given by defendant, but add the following for amplification of specific points.

During his opening argument, defense counsel talked about the physical injury sustained by the complainant.[1] The complainant, Jennifer Wall, told the court that after she told defendant he might as well kill her if he was going to rape her, defendant put his hands around her neck and started choking.[2] She said she couldn't breathe. Wall explained that when she went to her friend Kristen's house, Kristen took pictures of Wall's injuries.[3]

Later, officer Voigt of the Belleville police also took pictures of Wall's injuries. She had bruises on her back, a handprint on her neck, broken blood vessels around her eyes, and bruises on her inner thighs.[4]

During cross-examination, Wall repeated that defendant had had both hands on her neck and was choking her during the incident.[5] He also put a pillow on her face. Wall's friend, Kristen Bevard, told the court that when Wall came to her house on the day of the incident, she was hysterical, crying, and very upset. She had marks on her neck, under her eyes, and it looked like broken blood vessels near her eyes. Wall was also puffy and red.[6] Bevard took pictures of those

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[1]8/14, 18.

[2]8/14, 27.

[3]8/14, 31.

[4]8/14, 32, 37.

[5]8/14, 80.

[6]8/14, 102.

injuries. Bevard told the court, during cross-examination, that Wall showed her the marks on her back and legs, and cried most of the time she was with Bevard.

A nurse at St. Joseph Hospital explained to the court that she met with Wall on August 15 at the emergency room. Wall showed her reddish-purple spots on her skin, under her eyes. She also had marks on her neck.[7] Other injuries on Wall were marks on her back and inner thighs. While being questioned by defense counsel, the nurse again went over the injuries she had seen on Wall. When the court asked the witness about a possible source of some of the marks, the nurse said they could come from squeezing.[8] Defense counsel also asked how the spots under the eyes could occur, and the witness responded they could originate from the squeezing of something tight.

Another friend of Wall testified to seeing her on August 15 and to finding the same injuries that Bevard and the nurse described. Cpl. Voigt of the Belleville police stated he saw marks on Wall's neck, and spots around her eyes, as well as marks on her back.[9] The parties entered a stipulation on the record that the evidence collection kit, used on the complainant, revealed no semen or sperm.[10]

After the People rested, defendant argued a motion for directed verdict, claiming the complainant was inherently incredible. The court denied the motion.[11] Defendant then put his wife, Karen Phillips, on the stand. She told the court in part that pressure and choking could cause the

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[7]8/14, 116.

[8]8/14, 123.

[9]8/14, 140.

[10]8/14, 151.

[11]8/15, 8-9.

bruises Wall had.[12] Defendant testified and denied any assault or sexual abuse.[13] He admitted to having awakened Wall that day to drive her to work. He said he did drive her to her job. After two more witnesses testified, defendant rested.

The prosecutor, in closing argument, stated the case involved a credibility issue. But the evidence showed that defendant grabbed Wall's neck and choked her. Wall's friends and the hospital nurse saw the bruises on Wall's neck and the red marks by her eyes. The prosecutor said that defendant caused the physical injury to Wall and that minimally he was guilty of CSC 3. Then the prosecutor asked the court to consider the offense of assault with intent to do great bodily harm, which he called a cognate offense.[14]

In his closing argument, defendant agreed the matter was a credibility contest. Then defendant spoke about the bruises and marks on Wall's neck. He said the hospital records said nothing about strangulation. Counsel mentioned the bruises on Wall's clavicle and back. He argued that the evidence had to show what Wall said: that the marks were caused by strangulation.[15] In rebuttal, the prosecutor stated there was actual physical evidence from Wall as to the bruising on her throat. He said that defendant thought he could get away with choking Wall.

In its findings of fact, the court said it believed Wall was in the guest room in the home that day, and that a fight ensued between her and the defendant. The court did not believe defendant had

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[12]8/15, 68.

[13]8/15, 91.

[14]8/15, 116.

[15]8/15, 122.

engaged in sexual penetration, but that he tried to strangle Wall.[16] He tried to physically injure Wall and had the ability to do so. He intended to do great bodily harm to Wall. The court concluded that defendant was guilty of assault with intent to do great bodily harm, but not guilty of the two counts of CSC 1, personal injury. Defendant and his attorney said nothing about the verdict.

At sentencing, defense counsel asked for a sentence of probation. The prosecutor asked that defendant attend anger management classes. The court sentenced defendant to 5 years probation, the first six months to be served in jail. Defendant said nothing about the verdict rendered, nor did his attorney.

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[16]8/15, 135.

Summary of Argument

The charges in the information in this case were two counts of criminal sexual conduct, first degree, with force and coercion and causing personal injury. Defendant claimed he had done nothing to the complainant, but the evidence and testimony showed he had physically injured her on the date in question. Defendant acknowledged the injuries sustained by Wall from the outset of the case, and questioned witnesses about them. Since the evidence made out all elements of assault with intent to do great bodily harm, the court was justified in concluding defendant was guilty of that crime. On this record, defendant had notice of the possible need to defend against the claim of personal injury, and in fact did so at trial. Defendant also had the opportunity to defend against a claim that great bodily harm was done to Wall, especially since the defense asserted was denial.

MCR 6.112(H) and MCL 767.76 allow constructive amendment of an information where there is no objection to the constructive amendment, the evidence adduced at trial will support a guilty verdict of the added charge, and the record shows the accused has had notice and opportunity to defend against that offense. The proofs here established the crime of assault with intent to do great bodily harm less than murder by showing that defendant had choked and injured Wall during a fight at the crime scene. The prosecutor asked the court to consider assault with intent to do great bodily harm, and the court did so, without defense objection, reaching a verdict on that offense. At worst an unobjected-to constructive amendment of the information occurred, and no plain error occurred because fair notice was provided.

Analysis of defendant's claim should proceed, at most, under a harmless error standard, since it was never preserved (if error occurred, it was nonconstitutional error, though the plain error inquiry is the same for both constitutional and nonconstitutional error). Defendant has failed to show

that his trial amounted to a miscarriage of justice; his claims of error must be denied. There was nothing that took place in the lower court proceeding which could be said to have "seriously affected the fairness, integrity or public reputation of judicial proceedings ..."[17]

[17]*People v Carines*, 460 Mich. 750 (1999).

ARGUMENT

I. **Consideration by the trial judge as factfinder of an offense not a subset of the elements of the charged offense is, after *People v Cornell*, a constructive amendment of the information. Defendant was charged with CSC 1, by force or coercion with personal injury, the evidence showed defendant had choked and assaulted the victim, resulting in several injuries, and, after the close of proofs, the prosecutor asked the court to consider guilt as to assault with intent to do great bodily harm, to which no objection was made by defense counsel. On the facts here, plain error did not occur.**

Standard of review

The People accept the standard of review given by defendant.

Discussion

A. **Introduction**

In its order granting leave to appeal this court directed the parties to address:

- the retroactivity of *People v. Cornell*;
- whether MCL 767.76 allows the trial court to amend the information after the close of proofs to charge a cognate offense;
- if so, whether such an amendment after the close of proofs is constitutional in light of *Schmuck v. United States;*[18] and finally
- if such an amendment after the close of proofs is unconstitutional, whether the error could have been and was harmless.[19]

The People begin, then, with the question of the retroactivity of *Cornell*.

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[18] *Schmuck v. United States*, 409 US 705, 718, 109 S Ct 1443, 103 L Ed 2d 734 (1989).

[19] *People v. Phillips*, 664 NW2d 223 (2003).

B. *Cornell* and retroactivity[20]

The retroactivity question is a somewhat daunting one,[21] for two principal reasons:

- *Cornell* involves construction of a statute, and overrules prior decisions, but those decisions did *not* misconstrue the statute but simply ignored it. *Cornell* does not construe the statute differently than had previous decisions, but "plugs it back in," as it were. This court, then, did not in *Cornell* overrule a previous construction of the statute, but construed the statute *consistently* with prior decisions, requiring that this construction be followed and not ignored.

- Michigan has no comprehensive and coherent jurisprudence on retroactivity of overruling decisions.

In *Cornell* this Court stated that its decision "is to be given limited retroactive effect, applying to those cases pending on appeal in which the issue has been raised and preserved."[22] Defendant argues now that *Cornell* should be given "full" retroactive effect. The terminology of retroactivity is not always consistent, in large part because of differences between civil and criminal review. Once direct review is completed in a civil case, a collateral attack on the judgment is virtually impossible, save for fraud,[23] and thus to use the term "partially retroactive" to refer to those decisions applicable to the parties to the case in which the rule or overruling is announced, and to all other cases then pending on direct review where the issue is preserved, makes no sense in civil cases, for in civil

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[20] Retroactivity of *Cornell* is also discussed in some detail in the People's brief in *People v Nickens*, No. 123992, pending in this Court on leave granted.

[21] Though in *Cornell* itself the Court stated that its holding was applicable to cases pending on appeal with the issue preserved, it has also granted leave in another case, specifying that Parties "are directed to address the retroactivity of *People v. Cornell,* 466 Mich. 335, 646 N.W.2d 127 (2002)." *People v. Phillips*, 664 N.W.2d 223 (Mich. 2003).

[22] *Cornell*, at 367.

[23] See e.g. *Matter of Bulic*, 997 F2d 299 (CA 7, 1993); *Rogoski v Muskegon*, 107 Mich App. 730, 736, (1981).

cases this is "full" retroactivity. In criminal cases, collateral attack is more generally available through such mechanisms as state post-conviction proceedings–in Michigan, the motion for relief from judgment–and federal habeas corpus review, though the grounds for relief are far narrower than on direct review, as are the circumstances when a new rule or overruling decision applies. It is more sensible, in the People's view, to call overruling decisions that are applicable to the parties and to those cases pending on appeal where the issue has been preserved "fully retroactive," so to have a consistent terminology with civil and criminal cases, and to have a separate category of retroactivity for criminal cases where an overruling decision is applicable even on collateral attack. And indeed, federal decisions refer to this sort of retroactivity as "retroactive on collateral attack" or "retroactive to cases on collateral review."[24] The present case does not involve whether *Cornell* should be retroactive on collateral attack (and it plainly should not). But if *Cornell* is to apply retroactively–and the People agree it must–then it should apply, as the court said in *Cornell*, where the issue was properly preserved. Put another way. Ordinary principles of issue preservation and issue forfeiture apply in this context.

Though the question of remedies is a separate one, the retroactivity test developed by the United States Supreme Court–since repudiated by that Court, but still followed in Michigan–applies three factors:

- the purpose of the new rule;
- the general reliance on the old rule; and

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[24] See e.g. *Bottone v United States*, 350 F3d 59 (CA 2, 2003).

- the effect of retroactive application of the new rule on the administration of justice.[25]

The concern that reliance on the old rule may well have created "settled expectations" is considered important in resolving the question of applicability of a new rule to cases already tried and to conduct which has already taken place.

But because a construction of a statute or constitutional provision, even one overruling prior precedent, is considered an expression of what the law "is," this three-prong retroactivity test has been abrogated by the United States Supreme Court in favor of Justice Harlan's view that these overruling decisions are applicable on direct appeal to the case before the court and all cases then pending on appeal with the issue preserved (what the People term "fully retroactive).[26] As to decisions final at the time of the overruling decision, in the criminal arena, where collateral attack is possible, an overruling decision will be applicable on collateral attack only in very limited circumstances, the Court adopting, with some modification, Justice Harlan's view on this point as well. A new rule will be applied retroactively on collateral attack if it 1)places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or 2)announces a new watershed rule of criminal procedure necessary to the fundamental fairness of the criminal proceeding.[27]

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[25] See *People v Sexton*, 458 Mich 43, 60-61 (1998). This is not to suggest that *Sexton*'s holding that the rule of *People v Bender*, 452 Mich 594 (1996) is to be applied only to that case and future cases is mistaken, as *Bender* itself raises a question of legitimacy. The 3-1-3 decision turns on Justice Brickley's concurring opinion, which creates a rule of criminal procedure without grounding it on any constitutional or statutory authority.

[26] *Griffith v Kentucky*, 479 US 314, 322-23, 107 S Ct 708, 93 L Ed2d 649 (1987).

[27] *Teague v. Lane*, 489 US 288, 109 S Ct 1060, 103 L Ed 2d 334 (1989).

But a "judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."[28] Decisions–even overruling decisions–interpreting statutes should be fully retroactive, as the People have defined that term earlier; that is, to cases pending on direct appeal with the issue properly preserved.[29] This Court should follow the lead of the United States Supreme Court on the question of retroactivity principles. *Cornell* is retroactive, as the opinion says, to cases pending on appeal, which this case was, with the issue properly preserved, which the issue here was not.

Defendant makes the odd assertion that the issue was preserved by the *prosecutor's* request to the trial court in closing argument to consider assault with intent to do great bodily harm. The issue was not preserved at trial. The notion of issue preservation focuses on whether the person *appealing* preserved the claimed error. Defendant did not do so here. *Cornell* should not be applied to the facts of this matter. That "fully" retroactive decisions, even on constitutional questions, are applicable on direct appeal only where the issue was properly preserved is demonstrated by

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[28] *Rivers v. Roadway Express, Inc.*, 511 US 298, 312-13, 114 S Ct. 1510, 128 L Ed 2d 274 (1994).

[29] For example, what the court termed limited retroactivity in *Lesner v. Liquid Disposal, Inc.*, 466 Mich 95, 109 (2002) –" For these reasons, we hold that the present opinion is to be given only limited retroactive effect. The interpretation of M.C.L. § 418.321 articulated in this opinion is to be applied only to the present case; to other cases pending decision by a worker's compensation magistrate or on appeal, to either the WCAC or the Court of Appeals, in which the determination of the level of benefits to be paid a partial dependent is in issue; and to future cases in which the level of benefits due a partial dependent under M.C.L. § 418.321 needs to be initially determined"–the People submit is full retroactivity, as final civil judgments are not subject to collateral attack as are final judgments in criminal cases.

Hankerson v. North Carolina.[30] The Court there held that *Mullaney v Wilbur*[31] was "fully" retroactive, but stated also that "(t)he States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error."[32]

At most, then, review here is for plain error. No plain error occurred.

C. Constructive Amendment of An Information

(1) CSC 1 and Assault With Intent to Do Great Bodily Harm

If the information was constructively amended here, it was constructively amended without objection, and under the facts of this case no miscarriage of justice is affirmatively demonstrated by the defendant.

Defendant argues that assault with intent to do great bodily harm less than murder is not an included offense of criminal sexual conduct in the first degree, committed by way of force or coercion and personal injury, as included offenses are defined by *Cornell*, with which the People agree. Had the issue been preserved, then, because *Cornell* should be viewed as retroactive under the terms it stated itself, review would be for harmless error. But, as argued, the issue was not preserved. It is also argued that error was committed by the trial judge in considering assault with intent to do great bodily harm, as requested by the prosecutor without objection, on the ground that

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[30] *Hankerson v. North Carolina*. 432 US 233, 97 S Ct 2339, 53 L Ed 2d 306 (1977).

[31] *Mullaney v. Wilbur*, 421 US 684, 690-91, 95 S Ct 1881, 44 L Ed 2d 508 (1975).

[32] 432 US. at 244, n. 8, 97 S.Ct. at 2345 n. 8.

even under the law at the time assault with intent to do great bodily harm was not a cognate-included offense of criminal sexual conduct in the first degree. This latter point is questionable.

People v Payne[33] held that assault with intent to do great bodily harm less than murder is not a lesser included offense of first-degree sexual conduct, so that a requested instruction by the defendant on the offense was not required. The rationale of the case is that though the offenses may share some elements, they are not of the same category or class, not addressing the same societal interest.[34] Distinct social norms are protected by each of the statutes defining the crimes.[35] But in *People v Ellis*[36] the court upheld a felonious assault instruction and conviction where the criminal sexual conduct was accomplished by use of force by application of a screwdriver. And that different societal interests are protected is highly questionable; it is a commonplace that the gravamen of sexual assault is the assertion of power–the assault–and not the sexual aspect.[37] Moreover, while the defendant notes the element of "personal injury" involved in the sort of first-degree criminal sexual conduct charged here, giving its definition, defendant fails to note that the offense charged here also required force or coercion. Criminal sexual conduct in the first degree, charged under a theory of

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[33]*People v Payne,* 90 Mich. App. 713 (1970).

[34]Id..

[35]*People v Corbiere*, 220 Mich App 260 (1996); *People v Harrington,* 194 Mich. App. 424, 428 (1992).

[36]*People v Ellis,* 174 Mich. App. 139, 146 (1989).

[37] See e.g. *United States v. Powers*, 59 F.3d 1460, 1465-66 & n.5 (CA 4, 1996) ("The notion that harassment is only actionable sexual harassment when it can be attributed to the harasser's sexual interest in the victim is reminiscent of the now discredited idea that rape is a sexual act, rather than an act of violence. Today we understand it as the latter").

force or coercion coupled with personal injury, requires proof of a sexual penetration achieved by the use of force or coercion to commit the sexual act, meaning that the defendant "either *used physical force or did something to make the victim reasonably afraid of present or future danger.*"[38] (Emphasis added.) This sounds very much like an assault. There is a solid argument, then, that assault with intent to do great bodily harm was a cognate-included offense of criminal sexual conduct in the first degree, by way of force or coercion and personal injury, at the time of the trial here, so that no error occurred under the law as it then existed when the trial judge considered the offense and rendered a verdict finding defendant guilty of that offense, and, as argued, no error exists under a retroactive application of *Cornell* where the question was not preserved by proper objection.

But if assault with intent to do great bodily harm was not an included offense of *any* sort at the time of the defendant's trial, the question of a constructive amendment of the information–occurring upon the prosecutor's request for the trial court to consider the offense of assault with intent to do great bodily harm without objection–arises. If what occurred here was a constructive amendment of the information, that amendment was, where there was no objection, not improper.

(2) **Constructive Amendment and the Statute and Court Rule**

As well put by the federal courts, a "constructive amendment" occurs when "the evidence presented at trial, together with the jury instructions, raises the possibility that the defendant was convicted of an offense other than that charged in the indictment."[39] Federally, the difficulty with a constructive amendment of the indictment–an amendment achieved in some manner other than a

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[38] See CJI2d 20.1, as coupled with CJI2d 20.9.

[39] See e.g. *United States v. Wonschik*, 353 F3d 1192, 1197 -1197 (CA.10, 2004).

formal motion to amend, ordinarily by way of instruction on an offense not included within the charged offense–is twofold: 1)the constitutional difficulty of the requirement of a grand jury indictment on all offenses that does not exist with regard to constructive amendment of the information in Michigan, and 2)the difficulty of fair notice that arises both federally and in Michigan.[40]

Here, either if *Cornell* is viewed as applying to this case despite the lack of objection, or if assault with intent to do great bodily harm is found not to be a cognate-included offense of criminal sexual conduct in the first degree by way of force or coercion and personal injury, then the trial judge by his verdict of guilty of assault with intent to do great bodily harm constructively amended the information, accepting the invitation by the prosecutor, made without objection. Though the People believe that an amendment of the information–either formal or constructive–that charges a new offense is improper *over objection*,[41] here there was no objection, and the defendant should not be

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[40] See *United States v Gonzalez Edeza*, 359 F3d 1046 (CA 10, 2004).

[41] Mention must be made here of *People v McGee*, 258 Mich App 683 (2003). There the court appears to have held that though an amendment of the information to add a new charge is improper under the statute, MCL 767.76, it is permissible under the court rule, MCR 6.112(H), so long as there is no "unfair surprise or prejudice" to the defense. The People doubt that the court rule can be read in this fashion; *People v Goecke* , 457 Mich 442 (1998), discussed by the panel, does not lead to that conclusion, as it simply allows the circuit judge to amend the information by overturning the examining magistrate's decision not to bind over on an offense on which there *was* an examination. In any event, here the "constructive" amendment took place at the close of the proofs and not, as in *McGee*, before trial, and here, unlike in *McGee*, there was no objection. The question of unfair surprise or prejudice here goes not to the authority over the trial court to amend the information over objection so as to charge a new or added offense, but to whether either plain error or harmless error occurred (it being the view of the People that lack of objection requires analysis under plain error).

heard to complain that the trial judge considered a probationable offense[42] carrying a maximum of 10 years in prison as an alternative to a life offense that is not probationable, where no complaint was raised at trial.

In sum, then, the People do not believe that the statute or court rule authorize the trial judge to amend the information to charge an additional or new offense–one on which there has been no preliminary examination–*over the objection of the defense*, but there is certainly no bar to such an amendment by stipulation or agreement,[43] and a failure to object forfeits the issue, so that review, at most, is for plain error.

D. Plain and Harmless Error

Assuming for the sake of argument that this court finds either that *Cornell* applies to this case, or that even if it does not assault with intent to do great bodily harm was not a cognate-included offense at the time of the trial, so that the information was necessarily constructively amended by the trial judge on the prosecutor's request and by the court's verdict, the question is then one of the nature of review. Because there was no objection, review is for plain error.

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[42] And the defendant in fact received a sentence of probation.

[43] Indeed, given this court's recent decision in *People v Nutt*, __Mich__ (No. 120489, 4-2-2004) defense counsel may, when the situation arises, be well advised to agree to an instruction on an offense that is either what would formerly be called a "cognate" offense, or which is not included at all, to avoid the possibility of a second prosecution on that offense, even after an acquittal, as the nature of the acquittal may not bar a successive prosecution by collateral estoppel. For example, in the present case, had the trial judge not considered assault with intent to do great bodily harm as a possible verdict without objection, the judge could have rendered a verdict of not guilty on the criminal sexual conduct charge not on the ground that no assault occurred, but, as the trial judge in fact found here, that no *sexual* assault occurred, though an assault by way of strangulation *did* occur. On this acquittal at a bench trial, the People would be free to then charge the assault with intent to do great bodily harm, which, though part of the "same transaction," is a separate offense.

The error here is not constitutional; the constitutional dimension that exists in federal cases because of the requirement there of indictment by a grand jury does not exist in Michigan, and *Schmuck v United States*, alluded to by this Court in its grant of leave to appeal, is not a constitutional decision. Any "cognate"-included offense doctrine *raises* constitutional notice concerns that can occur on a case-by-case basis, but not as a matter of necessity in *all* cases. The Court in *Schmuck* did not suggest otherwise:

> Were the prosecutor able to request an instruction on an offense whose elements were not charged in the indictment, this right to notice would be placed *in jeopardy*. Specifically, if, as mandated under the inherent relationship approach, the determination whether the offenses are sufficiently related to permit an instruction is delayed until all the evidence is developed at trial, the defendant *may* not have constitutionally sufficient notice to support a lesser included offense instruction requested by the prosecutor if the elements of that lesser offense are not part of the indictment. Accordingly, under the inherent relationship approach, the defendant, by in effect waiving his right to notice, may obtain a lesser offense instruction in circumstances where the constitutional restraint of notice to the defendant would prevent the prosecutor from seeking an identical instruction. The elements test, in contrast, permits lesser offense instructions only in those cases where the indictment contains the elements of both offenses and thereby gives notice to the defendant that he may be convicted on either charge. This approach preserves the mutuality implicit in the language of [the court rule].[44]

But that notice concerns *informed* the decision against any cognate-included offense doctrine does not mean that a constitutional notice error will arise *whenever* an instruction is given, or a verdict reached, on an offense that is not a subset of the elements of the greater offense, and the Supreme Court did not so hold.

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[44] *Schmuck*, at 1451-52 (emphasis supplied).

Although the precise approach in the federal circuits is not uniform, the federal circuits review an unobjected to "constructive amendment" of the indictment for plain error.[45]

> We review unobjected-to claims of constructive amendment under a plain error standard. *United States v. Cavely,* 318 F.3d 987, 999 (10th Cir.2003). To meet this standard "the error must (1) be an actual error that was forfeited; (2) be plain or obvious ...; (3) affect substantial rights ....[; and] (4) ... seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Edgar,* 348 F.3d 867, 871 (10th Cir.2003).[46]

There is a three-way circuit split on the plain-error approach:

- Constructive amendments, because they are structural errors, affect substantial rights *apart* from prejudice, but *because of the constitutional requirement of a grand jury indictment*, a ground not applicable in Michigan.[47]

- Constructive amendments raise a rebuttable presumption that a substantial right was affected.[48]

- The defendant must show either that an innocent person was likely convicted, or that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings ("ordinary" plain-error review).[49]

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[45] And it must be remembered that plain-error review applies equally to forfeited constitutional error as to forfeited non-constitutional error. See *Carines*, supra.

[46] *United States v. Gonzalez Edeza*, supra.

[47] *United States v. Floresca,* 38 F3d 706, 712-13 (CA 4, 1994) (en banc).

[48] *United States v. Syme,* 276 F3d 131, 154 (CA 3, 2002).

[49] *United States v. Fletcher,* 121 F3d 187, 192-93 (CA 5, 1997) (refusing to reverse unobjected-to constructive amendment because "it could not have affected the outcome of the trial"); *United States v. Remsza,* 77 F3d 1039, 1044 (CA 7, 1996) ("In the context of plain error review, the amendment must constitute a mistake so serious that but for it the defendant would probably have been acquitted in order for us to reverse.").

And other jurisdictions have also considered the effect of an unobjected-to instruction on an offense that is not included within the charged offense. In California, when a defendant fails to object to instructions on an offense, purportedly a lesser-included offense but which in actuality is not, the failure to object constitutes "an implied consent to the jury's consideration of the lesser related offense and a waiver of any objection based on lack of notice."[50] New York cases on the issue hold similarly. In *People v Wachs,*[51] the appellate panel ruled that where the defendant fails to object to lack of notice prior to summation concerning consideration of a lesser included offense at a bench trial, appellate consideration of the claimed error is forfeited.

The California court put it this way:

> At issue is whether the due process right of an accused to be notified of criminal charges renders invalid a conviction for a lesser included offense when no objection was raised at trial to the jury's consideration of the offense. Because submission of lesser related offenses to the jury enhances the reliability of the fact-finding process to the benefit of both the defendant and the People, and because lack of notice is an issue which generally may not be raised for the first time on appeal, we have concluded that when a lesser related offense is submitted to the jury without objection, the defendant must be regarded as having impliedly consented to the jury's consideration of the offense, and that absent other reversible error, the conviction and judgment should be affirmed.[52]

Because in the present case there was no objection, and a tactical reason not to object (consideration of a probationable 10-year offense as an alternative to the charged life offense), review should

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[50]*People v Toro,* 766 P2d 577, 584 (1989). See also: *People v Rasher,* 3 Cal App 3d 798,, 83 Cal Rptr 724 (1970), *People v Hensel,* 233 Cal App 2d 834, 43 Cal Rptr 865, cert den 382 US 942 (1965).

[51]*People v Wachs,* 93 AD 2d 846, 461 NYS 2d 73 (2d Dep't, 1983).

[52]*Toro,* 968.

proceed no further. But even on the question of fair notice, the stringent prejudice showing required by plain-error review cannot be made.

Here, without objection and on the prosecutor's request, the trial judge considered–and reached a verdict on–assault with intent to do great bodily harm, where the uncontradicted evidence showed physical injuries to the victim and the victim testified that defendant caused them, and the information charged an offense involving both personal injury and force or coercion as elements. Defendant was quite plainly on notice that it was alleged that he had attacked the victim, strangling her and causing injuries.

In *People v Willett*[53] defendant was charged with CSC 1, committed during another felony—breaking and entering. At the close of proofs the information was amended to allege that the CSC 1 caused personal injury. Though the conviction was reversed because on the facts defendant had no notice and opportunity to disprove the personal injury element where the change came at the close of proofs, the court also said that if the original information adequately informed the defendant of the nature of the charge, an amendment of this sort might be permissible. So also here. The information alleged commission of the CSC 1 and resulting personal injury, as well as force and coercion. Throughout the history of the case, the personal injury and force and coercion aspects were part of the charge, and delineated by discovery, the preliminary hearing, and review of relevant evidence. Defendant denied from the outset that he had sexually assaulted the victim, and thus had not caused the physical, personal injury she sustained. At trial, defendant's opening statement mentioned the victim's injuries. During trial, defendant queried the victim about the

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[53]*People v Willett*, 110 Mich. App. 337 (1981).

physical injuries, and argued strenuously that they may have been caused by something other than his conduct. Defendant agreed with the prosecution that the matter was a credibility contest, arguing that he simply had not done *any* of what was charged.

In *People v Ellis,*[54] the defendant was charged with kidnapping and CSC 1, the prosecutor's theory being that the sexual assault occurred when defendant used a screwdriver to coerce the victim. The court instructed the jury on felonious assault and defendant was convicted of that charge and not the CSC. On appeal, recognizing that defendant had objected to the giving of the felonious assault charge, the court held that "notice to defendant may be adequate with regard to a lesser cognate offense if the language of the charging document gives defendant notice that he could face a lesser offense charge." No error was found in the instruction on the felonious assault.

So, too, here. It cannot be said that plain error occurred where the language of the charging document gave defendant notice he was facing allegations both of force and coercion and physical injury to the victim. The proceedings here were fundamentally fair and reliable.[55]

E. Conclusion

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[54] *People v Ellis,* 174 Mich. App. 139, 146 (1989).

[55] And see e.g. *United States v Gonzalez Edeza*, supra; *United States v Reyes*, 102 F3d 1361 (CA 5, 1996)(declining to find plain error where the indictment was constructively amended); *United States v Martin,* 783 F2d 1449 (CA 9, 1986) (in a bench trial, the defendant was convicted of assault with a deadly weapon with the intent to do bodily harm, although charged only with assault resulting in serious bodily injury. On review, the court held that a defendant has adequate notice of a lesser included offense when the charge of which he is convicted is a lesser included offense on the facts of the matter, and he had actual notice of facts constituting the lesser charge. The panel explained that although the lesser offense in *Martin* contained two elements *not* necessarily included in the charged offense, the evidence presented at trial indicated that the defendant had assaulted the victim with an axe, causing serious injury. Therefore, the lower court's verdict of guilt was proper, given that Martin knew from before trial that he might be faced with proofs showing assault with an axe and resultant serious injury).

In answer, then, to the Court's questions in the order granting leave to appeal:

- *People v. Cornell* should be, as the opinion states, applicable to cases pending on direct appeal with the issue properly preserved. Because the issue was not preserved by objection here, review is, at most for plain error.

- Post-*Cornell*, neither MCL 767.76 nor MCR 6.112(H) allow the trial court to amend the information after the close of proofs to charge a cognate offense *over the objection of the defendant.*

- Were the trial judge to amend an information at the close of the proofs over the objection of the defendant non-constitutional error would occur, reviewable for harmless error under *People v Lukity*,[56] *Schmuck v. United States* not governing, the case not being a constitutional case; focus would be on fair notice under the facts of the case.

- As stated, an amendment over objection would be error but nonconstitutional error and reviewed for harmless error; where there was no objection, as here, review is for plain error.

Plain error did not occur here, and on the facts of the case, even review under the standard for preserved error demonstrates any error was harmless.

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[56] *People v Lukity*, 460 Mich 484 (1999).

II. **To show ineffective assistance of counsel, defendant must prove that counsel committed a serious error which prejudiced defendant's right to a fair trial. Here, the CSC 1, personal injury claim specified physical injury, all discovery materials indicated physical injury to the victim, and at trial counsel questioned the victim and witnesses as to the physical injuries even though the defense was denial of any assault, and there was no objection to the court considering the great bodily harm charge. Defendant has not shown that counsel committed a serious mistake which prejudiced his right to a fair trial.**

Standard of review

The People accept the standard of review given by defendant.

Discussion

The People submit that if plain error has not been shown, then neither has ineffective assistance of counsel. The law would make no sense if a forfeited issue where the plain error standard cannot be met can nonetheless cause reversal under ineffective assistance. In fact, the prejudice prongs of the tests (and even the error test itself–that error must occur that was plain or obvious) coalesce. Ineffective assistance of counsel is appropriate for non-record claims (failure to prepare, or interview, or call alibi witnesses, and so on). But of-record claims are reviewed for plain error, and if plain error does not exist, the inquiry is at an end. Here plain error cannot be shown, as argued previously, and defense counsel had a sound strategic reason for not objecting to consideration of the assault with intent to do great bodily harm–it offered an alternative to a nonprobationable life offense of a probationable 10-year offense. Defendant was not denied his right to a fair trial.[57]

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[57] *People v Pickens*, 446 Mich 298 (1994).

RELIEF

WHEREFORE, the People ask this Court to affirm defendant's conviction and sentence.

Respectfully submitted,

Kym L. Worthy
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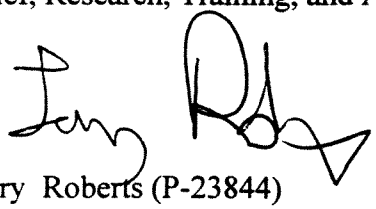
Timothy A. Baughman
Chief, Research, Training, and Appeals



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